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In The
Supreme Court of the United States
October Term, 1984

CRAWFORD COUNTY, WISCONSIN,
Petitioner,

v.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

ROBERT M. HESSLINK, JR.
Attorney for Respondents

6000 Gisholt Drive
Monona, Wisconsin 53713
(608) 221-3151
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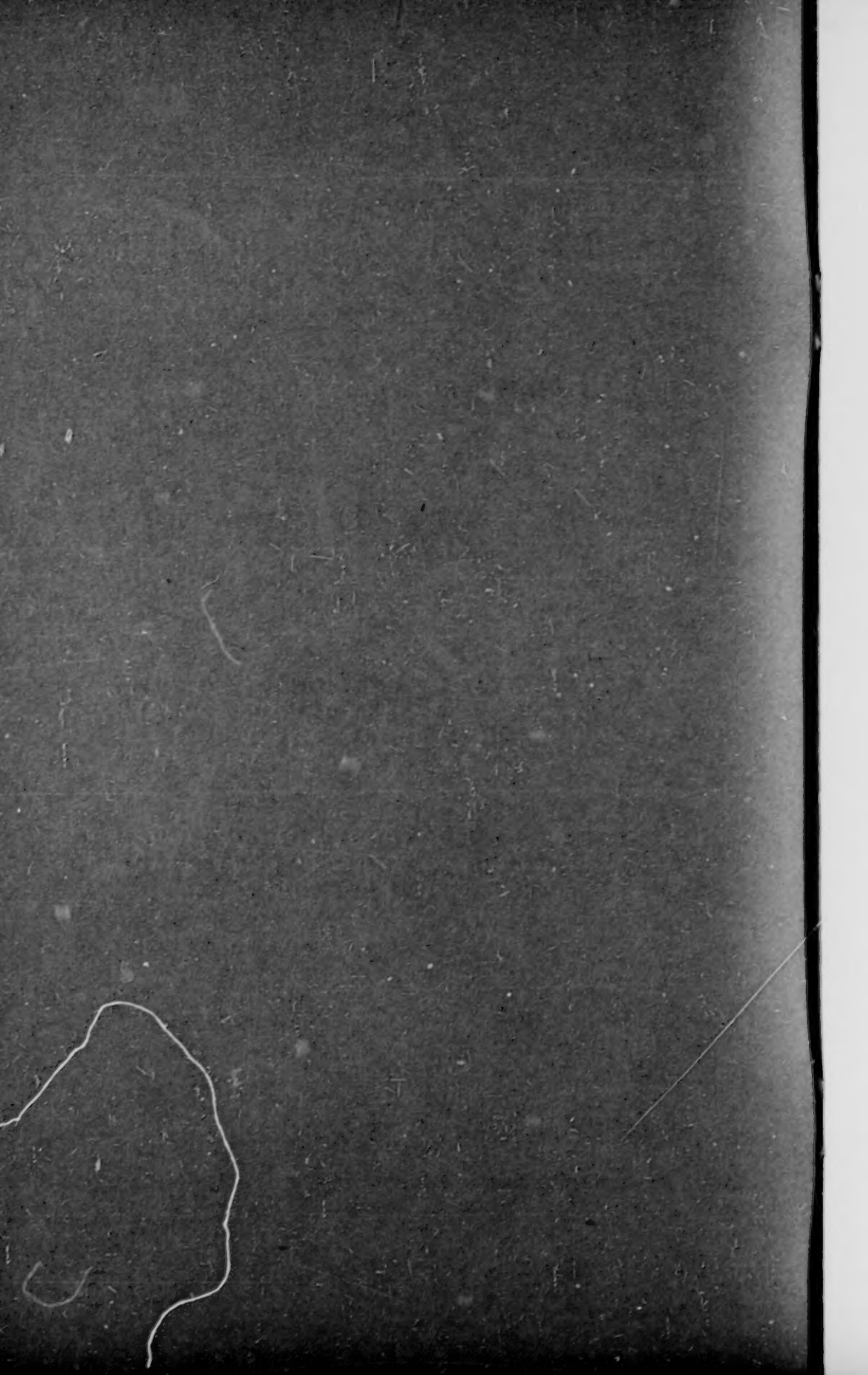
COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333



QUESTIONS PRESENTED

1. Does a municipality satisfy its burden of establishing that age 55 is a bona fide occupational qualification for law enforcement personnel who do not have 20 years of service by showing that those employees have some duties in common with federal law enforcement officers who can be retired at age 55 if they do have 20 years of service?

2. Did the circuit court err in giving deference to the BFOQ test set forth in the EEOC Guidelines?

3. Is the State of Wisconsin a deferral state so as to trigger the 300-day charge filing requirement?

4. Did the circuit court abuse its discretion in refusing to entertain a statute of limitations argument not pursued before the district court?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the petitioner, Crawford County, and the respondents, Wesley N. Heiar, Kenneth I. Strauman and Myrl E. Brown.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

STATEMENT OF THE CASE

This is a petition for certiorari seeking review of a circuit court decision upholding a district court decision

that the mandatory retirement of three local law enforcement officers violated the ADEA.

On December 3, 1979, Respondents Wesley Heiar and Kenneth Strauman filed charges of age discrimination with the Equal Employment Opportunity Commission (EEOC). (Pet. App. 39-40) Myrl Brown, the other respondent, filed a complaint of age discrimination with the EEOC on December 7, 1979. (Pet. App. 40) These charges contended that their mandatory retirements earlier that year violated the Age Discrimination in Employment Act (ADEA). Heiar, Strauman and Brown were involuntarily retired in June and September, 1979, from their Crawford County positions of patrolman, sergeant of traffic, and sergeant of radio and jailer, respectively. (Resp. App. 2A)

In December, 1979, all three respondents also filed charges of age discrimination with the Wisconsin Equal Rights Division. (Resp. App. 3A-4A) The Equal Rights Division rejected the respondents' claims "because Wisconsin's Fair Employment Law does not cover age discrimination against any hazardous type occupation such as law enforcement or fire fighting." (Resp. App. 4A) Conciliation was undertaken by the EEOC. (Resp. App. 4A) On March 18, 1982, all respondents were notified that EEOC's attempted conciliation had been unsuccessful. (Resp. App. 4A)

An action for equitable relief and damages under the ADEA was commenced in federal district court on April 16, 1982. (R. 1 Summons and Complt.) The petitioner, Crawford County, is a municipal corporation of the State

of Wisconsin and the former employer of the respondents. (Pet. App. 30)

The petitioner had asserted numerous affirmative defenses to the respondents' claims. Two of those defenses now form the basis of its petition for certiorari; a general allegation that the claim is barred by the statute of limitations and an allegation that being less than age 55 was a bona fide occupational qualification. (R. 7, pp. 9 & 10)

Under the trial court's pretrial procedures, the parties prepared a joint pretrial report and each prepared its proposed findings of fact and conclusions of law. (R. 43, 44 and 46) These proposed findings were to contain all of the issues upon which each party requested the court to rule. The petitioner's proposed findings did not contain the necessary proposed findings to support a two year statute of limitations defense. Its trial brief was also silent with respect to this issue. (R. 45)

The sole statute of limitations issue raised by the petitioner prior to trial was the petitioner's statute of limitations defense based on 29 U.S.C. § 626, the 180-day filing requirement with the Equal Employment Opportunity Commission. The district court, therefore, made no finding with respect to the two-year statute of limitations defense. (Pet. App. 28-41)

Trial to the court was held on April 4, 5 and 6, 1983. Following final arguments on April 13, 1983, the district court rendered a bench decision. (Pet. App. 44-65) The district court found in favor of all three respondents and ordered backpay and reinstatement. (Pet. App. p. 41) On April 15, 1983, the district court rendered its written Findings of Fact and Order for Judgment. (Pet. App. 28-41)

Judgment was entered in favor of respondents on April 21, 1983. (Pet. App. 66-67) On respondents' motion, an Amended Judgment for respondents was entered on June 9, 1983. (Pet. App. 68-71) Petitioner filed notices of appeal from the original and Amended Judgments. (R. 56, R. 66) The Court of Appeals affirmed the decision of the district court on these issues. (Pet. App. 1-27, 79-80)

In June, 1977, the law enforcement committee of the Crawford County Board adopted a motion requiring compulsory retirement of all law enforcement employees at age 55. Heiar, who was age 54, appeared at that meeting and requested an extension past his 55th birthday. The Committee refused to change the policy, but granted Heiar an extension of his retirement on a month-to-month basis. (R. 85, Tr. I, pp. 70-72)

ADEA was amended in April 1978 to prohibit mandatory retirement pursuant to employee benefit or pension plans. The law enforcement committee of the Crawford County Board of Supervisors, voted at its April, 1979 meeting to submit to the County Board a resolution requiring mandatory retirement at age 55 for all sheriff's deputies without exception. (R. 82, Tr. II, pp. 281-282) On April 17, 1979, the County Board at its annual session considered and adopted that resolution. (R. 82, Tr. II, p. 282)

At the times of their retirements, Strauman and Brown were 55 years old. Heiar was 56. None of them had accumulated 20 years of law enforcement service so as to qualify for full retirement benefits. (Resp. App. 2A)

Respondents, at all times, up to and including their mandatory retirements, satisfactorily performed their du-

ties as deputy sheriffs. (Resp. App. 3A) The trial court found all three respondents to be physically qualified to return to their jobs at the time of trial. (Pet. App. 36)

Crawford County did not have an ongoing physical fitness program for any of its deputy sheriffs. (Resp. App. 3A) Prior to the decision to compel retirement, petitioner did not request a medical evaluation to determine the respondents' fitness to retain their jobs. Crawford County has never required any incumbent deputy sheriff to pass a regular fitness test or medical examination in order to retain their jobs. (Resp. App. 3A) The County had not, and has not, conducted any studies to determine whether age, or being age 55, affects performance of deputy sheriff duties. (R. 82, Tr. II, pp. 273-292 and 323-352.)

Crawford County had never considered physical endurance, strength, and agility to be a major requirement of the job of deputy sheriff. In fact, the County employed, as part of a small department, a jailer with one leg, a deputy with diabetes and a chief deputy who weighs over 300 pounds. (Resp. App. 10A-12A)

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case because the reasons stated in the petition do not meet the standards set forth in Supreme Court Rule 17.

The petition does not demonstrate that there is a conflict among the circuit courts on the question of the

weight to be given federal retirement provisions when evaluating a bona fide occupational requirement which requires resolution by this Court. In fact, the facts of this case do not support a finding in favor of the petitioner, even on the rationale applied by the Court of Appeals for the Fourth Circuit in *Johnson v. Mayor and City of Baltimore,* 731 F.2d 209 (4th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3291 (U.S. Sept. 27, 1984, No. 84-518) and 53 U.S.L.W. 3405 (U.S. Nov. 2, 1984, No. 84-710).

There is no inconsistency whatsoever among the circuit courts on how a BFOQ is to be determined in a law enforcement setting. All circuits have required the employer to factually establish at trial the BFOQ criteria set forth in the EEOC Guidelines and *Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224 (5th Cir. 1976). Those decisions, and this decision, are in accord with this Court's prior, and recent, holding on the same point in *EEOC v. Wyoming,* 460 U.S. 226 (1983). Therefore, this Court need not exercise its discretion to grant the writ in order to resolve a conflict among the circuits on this issue.

It would also be inappropriate for this Court to grant the writ in order to address the petitioner's statute of limitations arguments. Petitioner cites no decisions of this Court, or any other circuit court, which conflict with the decision below on the 180/300 day statute of limitations question. In addition, the decision of the court below was based on that court's interpretation of state, not federal, law.

The petitioner acknowledges that it abandoned its two year statute of limitations defense at the trial court level, if indeed it ever raised it. The general rule is that

a circuit court is not required to consider such a defense for the first time on appeal. Since the decision by the court below fits well within that general rule, no review by this Court is necessary or appropriate.

ARGUMENT

The factors which this Court will consider in determining whether to grant a petition for certiorari are contained in Rule 17. That section provides, in relevant part, that the Court will consider a petition for certiorari in the following circumstances:

> "RULE 17. Considerations governing review on certiorari.
>
> • • • •
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> • • • •
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

The petitioner proposed three issues for review by this Court. First, the petitioner argues that there is a

conflict among the circuits on the question of the weight to be accorded to the federal retirement age in determining a BFOQ for local government employees performing similar functions. Secondly, the petitioner contends that the question of whether Wisconsin is a "deferral state" within the meaning of this case presents a novel question of federal law. Finally, the petitioner argues that the circuit court abused its discretion in not allowing petitioner to revive a statute of limitations defense it had abandoned in the trial court.

For the reasons which follow, none of these arguments would merit intervention by this Court.

I. THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT.

We contend that this Court need not review the decision below on the BFOQ for two reasons. First of all, despite petitioner's assertions to the contrary, the decision below was fully in accord with this Court's prior holdings and the holdings of other courts. It is also in accord with the criteria applied by other courts in determining the existence of a BFOQ defense. See, for example, *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984); *EEOC v. County of Los Angeles,* 706 F.2d 1039, cert. denied, — U.S. —, 104 S.Ct. 984 (9th Cir. 1984); *Tuohy v. Ford Motor Company,* 675 F.2d 842 (6th Cir. 1982); and, *EEOC v. Commonwealth of Pennsylvania,* — F. Supp. —, 36 F.E.P. Cases 234 (D.C.M.D. Penn. 1984). Other courts which have addressed the issue have uniformly required municipal employees to establish the criteria set

forth in the EEOC guidelines, 29 C.F.R. § 1625.6 (b). This decision of the court below is thus in accord with the prevailing view among the circuit courts.

Secondly, this case is readily distinguishable from the case upon which the petitioner primarily relies, *Johnson v. Mayor and City of Baltimore,* 731 F.2d 209 (4th Cir. 1984).

A. The Decision Of The Court Below Is Fully In Accord With The Standards Previously Set Forth By This Court.

In its petition, Crawford County contends that this Court left open in *Wyoming, supra,* the question of whether 5 U.S.C. § 8335 (b) precludes the application of normal ADEA standards to state protective services employees. (Petition at pp. 7-8) That represents an extremely myopic view of the *Wyoming* decision. In fact, in reaching its decision in *Wyoming,* this Court specifically addressed the issue which the petition now seeks to again place before it.

Petitioner cites this Court's statement at 460 U.S. 240 that "the state's discretion . . . is merely being tested against a reasonable federal standard" as implying that this Court intended that the "reasonable federal standard" be the retirement age for federal law enforcement officers. In fact, the "reasonable federal standard" referred to by the Court was the standard at issue in that case, i.e., the ADEA. This view is further supported by other language in the Court's opinion.

In *EEOC v. Wyoming,* 460 U.S. 226, 239 (1983), this Court, in finding that the ADEA did not violate the Tenth

Amendment, and in further explaining its implications on state and local government employment hiring practices, noted that:

> "[T]he Act requires the State to achieve its goals *in a more individualized* and careful *manner* than would otherwise be the case, ..." (Emphasis added)

The individualized approach, rather than the use of age as a blanket criteria for making employment decisions, is the heart and soul of what the ADEA mandates. The stereotyping of older employees as being less capable is exactly the evil which the ADEA was enacted to preclude. Thus, the language in this Court's opinion belies any inference that the court intended to apply a nationwide standard of retirement age for wholesale classes of employees.

This Court in *Wyoming* specifically rejected the idea that the ADEA's thrust was somehow modified by federal retirement statutes. In reaching that conclusion, this Court specifically stated that:

> "We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the Federal Government happens to impose mandatory retirement on a small class of its own workers. . . . Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that determination. . . ." 460 U.S. at p. 243, n. 17.

Our view is further supported by the fact that this Court has also held that the standards applicable to the employment practices of public employers are the same as those which are utilized by courts when evaluating the

employment practices of private employers. See, *Dothard v. Rawlinson,* 433 U.S. 321 (1977).

The petition sets forth, as one of its grounds for review, the fact that the circuit court relied upon the two-prong BFOQ test set out in the EEOC regulations at 29 C.F.R. § 1625.6 (b). Rather than being a basis for review, the fact that the Guidelines were followed is the best indication this Court can have that the decision below is correct. The use of the EEOC guidelines has been specifically approved, both by this Court, and the court below in previous cases. In *Griggs v. Duke Power Company,* 401 U.S. 424, 433-434 (1971), this Court specifically approved, and mandated, use of the EEOC guidelines, stating, "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

The court below has also previously concluded that the EEOC guidelines are entitled to a presumption of validity. See, *United States v. City of Chicago,* 549 F.2d 415, 430 (7th Cir. 1977). Consistent with this Court's holding in *Griggs,* that court concluded that:

> "Compliance with these Guidelines is generally required absent some showing that a cogent reason exists for noncompliance." 549 F.2d at p. 430.

Thus, the decision below is fully in accord with the principles previously developed and applied by this Court. There is therefore no need for this Court to direct its limited resources towards its review.

B. This Case Is Readily Distinguishable From The Baltimore Case.

In *Johnson v. Mayor and City of Baltimore, supra,* the Court of Appeals for the Fourth Circuit concluded

that the City of Baltimore was entitled to retire its firefighters at age 55 because federal law permitted federal firefighters to be retired at age 55 in certain circumstances. That decision, however, is distinguishable from this case in at least two respects.

The petitioner has also cited a recent decision by the Eighth Circuit Court of Appeals in *EEOC v. Missouri State Highway Patrol,* — F.2d —, 36 F.E.P. Cases 401 (8th Cir. 1984) as reaching a similar conclusion. The *Missouri State Highway Patrol* decision was not based, however, on the same rationale as *Baltimore.* Rather, the court in the *Missouri State Highway Patrol* case based its decision on the extensive evidence which had been introduced by the employer in support of its BFOQ defense.

> "[T]he Patrol has established that there is a factual basis for believing that substantially all Patrol members over the age of 60 lack sufficient aerobic capacity to perform their duties safely and efficiently. The Patrol also has established the inefficacy of testing, as an alternative to age, as a means of distinguishing among the individuals over 60." 36 F.E.P. Cases at p. 407.

The court in *Missouri State Highway Patrol* applied the EEOC test, the same test generally accepted by all the circuits, and the court below, for establishing a BFOQ defense. See, *Usery v. Tamiami Trail Tours, Inc., supra,* and *Orzel v. City of Wauwatosa,* 697 F.2d 743, cert. denied, — U.S. —, 78 L.Ed. 2d 680 (7th Cir. 1983). This is the very same test which the court below applied to this case and found, quite correctly, that the petitioner's evidence failed to meet. The petitioner does not even argue that its evidence would meet the *Tamiami* test and EEOC Guidelines.

While the court in *Missouri State Highway Patrol* did mention the federal retirement age of 55 for law enforcement personnel, in passing, as additional support for its conclusion that the highway patrol had carried its burden in establishing a BFOQ, it hardly based its conclusion on that basis. Indeed, the court could not have rested its decision on that basis since the retirement age it was upholding was 60, not 55. Thus, the only court which has applied a federal retirement age to a nonfederal employee was the Fourth Circuit Court of Appeals in the *Baltimore* case.

In *Baltimore,* the Fourth Circuit concluded that, because firefighters at the local level perform substantially identical duties to federal firefighters, Congress must have intended to make the federal retirement for federal firefighters applicable to municipalities when it extended the ADEA to local units of government. Even assuming *arguendo* that this decision is even arguably correct, and in light of footnote 17 to this Court's decision in *Wyoming* we do not think that it is, the decision of the court below in this case is readily distinguishable.

We note first that the trial court below did not make the findings necessary to support a BFOQ finding even under the *Baltimore* rationale. That court did not find that the duties of Crawford County deputy sheriffs were substantially identical to those of the federal law enforcement officers to whom the petitioner wishes to draw a parallel. The court merely concluded, as part of its findings, that:

> "55. The duties performed by United States Deputy Marshalls are similar *in many respects* to the duties

performed by the deputy sheriffs in various counties of Wisconsin, including Crawford County. . . .

56. *Some* duties performed by FBI agents are similar to those law enforcement duties performed by deputy sheriffs in Wisconsin counties, including Crawford County." (Pet. App. 36-37) (Emphasis added)

In fact, the record below clearly established that the majority of duties performed by Crawford County deputy sheriffs in general, and by these respondents in particular, were traffic patrol and radio dispatch functions not performed at all by either United States marshals or FBI agents. (Resp. App. 6A-8A) Thus, any attempt to establish a parallel between the duties performed by these local law enforcement officers and those performed by federal law enforcement officers must necessarily fail, at least on the record made in this case. While the court in *Baltimore* may have concluded that the duties involved in fighting fires at all levels of government are substantially identical, the duties involved in law enforcement at varying levels of government are not.

Secondly, the record in this case clearly establishes that, even if the three respondents in this case had been federal law enforcement personnel, they would not have been subject to mandatory retirement. For, not all federal law enforcement officers are required to retire at age 55. Those officers who do not have 20 years of federal service are not required to be separated from service until they reach either 20 years of service of 60 years of age. See, 5 U.S.C. § 8335 (b), incorporating by reference § 8336 (c). In the instant case, none of the respondents had achieved 20 years of service or the age of 60 at the time of their retirement. (Resp. App. 2A)

It follows that, even assuming *arguendo* that 5 U.S.C. § 8335 (b) was incorporated wholesale into the ADEA,

Crawford County would still not have been permitted to mandatorily retire these three employees. This factual difficulty with the petitioner's position renders the entire issue, of a conflict with the *Baltimore* decision, academic.

II. THE CIRCUIT COURT'S DECISION THAT THE CLAIMS ARE NOT BARRED BY THE 180-DAY STATUTE OF LIMITATIONS DOES NOT WARRANT REVIEW.

29 U.S.C. § 626 provides that no action on an ADEA claim may be commenced until 60 days after the filing of a charge with the EEOC. That charge must be filed within 180 days after the alleged unlawful practice occurred or, in deferral states, within 300 days after the alleged unlawful practice occurred.

All respondents filed their charges within 300 days of the dates on which they received even the earliest information that they were to be retired.[1] The court below held that Wisconsin is a deferral state, and hence, the 300-day limitation period applies.

There are two reasons why the court below held that the exemption contained in the Wisconsin statute for hazardous occupations did not preclude the state from being a deferral state in this instance. First, the statute, on its face, did not preclude the filing of charges with the state agency in this case. Secondly, the statute in question

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[1] This is not to say that the respondents agree that the rationale in *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Chardon v. Fernandez,* 454 U.S. 6 (1981) are applicable on the facts of this case. However, since the petition is addressed to the deferral state issue, we limit our response to that question.

had never been construed by the Wisconsin courts, nor had its validity, under state law, ever been determined. Thus, it was impossible for the respondents to ascertain whether or not the discrimination alleged was prohibited by Wisconsin law. That decision is in accordance with previous decisions of this Court and is premised upon a determination of state, not federal law. Hence, review by this Court would not be appropriate.

A. The Decision Below Is In Accord With Prior Decisions Of This Court.

Congress, in adopting the employment discrimination statutes made clear that it did not intend the federal law to supersede the authority of the individual states to control age discrimination. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980). Thus, § 14 (b) of the ADEA provides, in those states having a statute prohibiting age discrimination in employment and a state agency empowered to grant relief [deferral states], that no federal suit may be brought until 60 days after proceedings have been commenced under state law, unless the state proceeding has been earlier terminated.

In *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), this Court held that:

> "It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State

does not provide prompt or complete relief . . . " 447 U.S. at p.65.

Thus, in a deferral state the statute of limitations is not only longer, but a prospective plaintiff is also *required* to initiate his claims with the state agency.

Wisconsin has adopted a statute prohibiting discrimination in employment because of age. See Wis. Stat. § 111.31, *et seq.* Wisconsin has also empowered the Equal Rights Division to enforce the provisions of this Act. Wis. Stat. §§ 111.33 and 111.36. Therefore, since Wisconsin meets the facial statutory criteria for a deferral state, respondents were subject to both the additional requirement that they initiate action with the state agency and the longer 300-day charge filing requirement of § 7(d) (2). The respondents have complied with both of these requirements. The court below so held.

Petitioner argues, however, that because the Wisconsin statute does not provide relief in each and every instance in which relief would be available under federal law, Wisconsin is not a deferral state. It cites no authority for this proposition. In analogous situations, this Court and other courts have found that claimants must file their claims with the applicable state agency before they can pursue their federal claims even where no relief could be expected from the state agency.

This Court has previously held that a complainant, in a deferral state, need only file the complaint with the state agency. *Oscar Mayer, supra.* There is no further requirement that the matter be pursued further by either the agency or the individual claimant. In reaching that conclusion, this Court reasoned as follows:

> "By its terms, then, the section requires only that state proceedings be commenced 60 days before federal litigation is instituted; besides commencement no other obligation is placed upon the grievant." 441 U.S. at 759.

In *Oscar Mayer,* the complainant had not filed his complaint with the state agency prior to initiating action in federal court. This Court held that the federal action was premature because of the failure to file the state claim.

However, even though the statute of limitations under the state act had already passed, this Court also held that the claimant's mere act of filing with the state agency would then satisfy the federal requirements. The fact that the state agency would not have been empowered to grant any relief on that tardy claim was held to be irrelevant. In reaching this conclusion, the Court reasoned as follows:

> "[E]ven if a State were to make timeliness a precondition for commencement, rather than follow the more typical pattern of making untimeliness an affirmative defense, a state proceeding will be deemed commenced for purposes of sec. 14 (b) as soon as the complaint is filed." 441 U.S. at 760.

Thus, under the reasoning of *Oscar Mayer,* the fact that relief may not be available for an individual claimant in an individual case, or even that the state agency may lack jurisdiction over his claim, is not determinative. The state claim must first be filed if the state has a discrimination law and an agency empowered to enforce it. That state is a deferral state and hence a state in which the 300-day statute of limitations applies.

> "Individuals should not be penalized *if states decline for whatever reason* to take advantage of these opportunities." 441 U.S. at 761. (Emphasis added)

Therefore, the decision of the court below was in accord with these previously established principles.

B. The Deferral State Issue Is Primarily A Question Of State Law.

The court also, however, based its conclusion that Wisconsin was a deferral state upon its interpretation of the state of Wisconsin law at the time the charges involved were filed. In reaching that conclusion, the court noted that:

> "The exclusion of law enforcement officers from Wisconsin's age discrimination law, even as the law read at the time of the plaintiffs' termination, was not entirely free from ambiguity; a state court might have decided that only hazardous law enforcement jobs were intended to be excluded and might have gone on to find that these plaintiffs' jobs were not hazardous." (Pet. App. 8)

Certainly, the individual respondents, as laymen, cannot be presumed to have known, with any degree of certainty, that Wisconsin was not a deferral state. And, as the Supreme Court noted in *Mohasco Corporation v. Silver*, 447 U.S. 807 (1980):

> "[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with 'a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.' *Love v. Pullman Company*, 440 U.S. 552, 527, 30 L. Ed. 2d 679, 92 S. Ct. 616." 447 U.S. at 817, n. 4(b).

The circuit court concluded that the state law was not sufficiently clear so as to have completely foreclosed the possibility that there was some relief for these respondents under that state law. Since that decision necessarily

involves an interpretation of state law, and interpretations of state law fall outside the criteria applied in deciding to accept review as set forth in Rule 17, review by this Court would be inappropriate for that reason as well.

III. THE RESPONDENTS' CLAIMS ARE NOT BARRED BY THE 2-YEAR STATUTE OF LIMITATIONS.

The court below held that the two-year statute of limitations does not apply because it was not properly raised and maintained as a defense, and hence was waived.

The statute of limitations provision of the Portal-to-Portal Pay Act, 29 U.S.C. § 255, is an affirmative defense which must be pled in accordance with Fed. R. Civ. P. 8 (c). *Hodgson v. Humphries,* 454 F.2d 1279 (10th Cir. 1972) and *Mumbower v. Callicott,* 526 F.2d 1183, 1187 n. 5 (8th Cir. 1975). In *Hodgson,* the Court stated as follows:

> "We think it clear that section 6 was intended as a limitation on the remedy available, not on the right to bring the action, and must be pleaded as an affirmative defense in accordance with the requirements of Fed. R. Civ. P. 8 (c)." 454 F. 2d at 1284.

The Age Discrimination in Employment Act incorporates these statute of limitations provisions of the Portal-to-Portal Pay Act. 29 U.S.C.A. § 626 (e). The statute of limitations is thus waived if it is not raised in a pleading at the trial level. *Wagner v. Fawcett Publications,* 307 F.2d 409 (7th Cir. 1962).

In this situation, the petitioner did mention the bare words "statute of limitations" in its Answer. However, as the litigation progressed, it became clear that the statute of limitations to which petitioner referred was the limitation period for filing a charge with the EEOC. The

County made no mention of the two-year statute of limitations in its pretrial brief, or in its proposed findings of fact or conclusions of law. All of its argument was directed towards the alleged 180-day charge and filing requirement. It is clear that the statute of limitations pled by the County was the 180-day statute, not the two-year statute.

Even where a matter is adequately pleaded, it may be abandoned where no proof is given to support the allegation or where no action is taken on the allegation. *Deniccolo v. Paulmer,* 38 F. Supp. 874, aff'd 125 F.2d 127 (2d Cir. 1942). In this situation, no reference whatsoever was made to the two-year statute after the initial pleading of a "statute of limitations." The court below thus properly concluded that it had been abandoned and precluded the petitioner from raising this issue for the first time on appeal.

Petitioner acknowledges, at page 15 of its petition, that it did not "press" the two-year statute until its appeal. Petitioner also acknowledges in its petition that the decision to permit or not permit a party to raise a defense previously abandoned is within the discretion of the circuit court. The fact that another circuit court, on a different set of facts, exercised its discretion in a different way does not create a conflict among the circuit courts on the underlying legal rule, i.e., that the matter is discretionary. Indeed, this Court also declines to review issues not adequately presented below. See, *Ellis v. Dixon,* 349 U.S. 45, reh. denied, 350 U.S. 855 (1955).

Thus, the court below did not abuse its discretion by refusing to hear an issue not pursued below so as to call for an exercise of this Court's supervisory power.

CONCLUSION

For the above reasons, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 11th day of January, 1985.

Respectfully submitted,

ROBERT M. HESSLINK, JR.
Hesslink Law Offices, S.C.
6000 Gisholt Drive
Monona, WI 53713
(608) 221-3151

APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case # 82-C-273

WESLEY N. HEIAR, et al.,

Plaintiffs,

v.

CRAWFORD COUNTY, WI., et al.,

Defendants.

JOINT PRE-TRIAL REPORT

Date of Pre-Trial Conference: March 24, 1983

/s/ JEAN G. SETTERHOLM
DeWITT, SUNDBY, HUGGETT &
SCHUMACHER, S.C.
P.O. Box 2509
Madison, Wisconsin 53701
Counsel for Plaintiffs

/s/ DAVID LEO UELMEN
788 N. Jefferson
P.O. Box 92099
Milwaukee, Wisconsin 53202

R. J. SATTER,
District Attorney
Crawford County Courthouse
Prairie du Chien, WI 53821
Counsel for Defendants

UNCONTESTED MATERIAL FACTS

* * * *

9. Plaintiff Heiar was born September 15, 1922. Answer to Amended Complaint, para. 24.

10. Plaintiff Strauman was born May 24, 1924. Answer to Amended Complaint, para. 25.

11. Plaintiff Brown was born September 9, 1924. Answer to Amended Complaint, para. 26.

12. Plaintiffs were retired from their employments pursuant to the retirement policy established by the County. Answer to Amended Complaint, para. 28(b).

* * * *

14. Crawford County adopted a resolution on April 17, 1979, a part of which reads as follows:

> "Now, therefore, be it resolved, that it is the policy of Crawford County, Wisconsin that all non-elective protective occupation participants in the employ of said county cease employment for said county on the day on which said protective occupation participants of the Wisconsin Republic [sic] Employees Retirement Fund reaches the age of fifty-five (55) years."

Answer to Amended Complaint, para. 34.

* * * *

18. Plaintiff Heiar was employed as a full time deputy sheriff of Crawford County from November, 1970 until June 30, 1979.

* * * *

21. Plaintiff Strauman was employed by Crawford County as a full-time deputy sheriff continuously from 1962 to June 30, 1979.

* * * *

23. Plaintiff Brown was employed by Crawford County as a full-time deputy sheriff from 1969 until September 9, 1979.

* * * *

26. Plaintiffs at all times, up to and including their mandatory retirements, satisfactorily performed their duties as deputy sheriffs.

• • • •

28. At the time of Plaintiffs' involuntary retirements Crawford County did not have an annual medical check up, physical fitness requirement or an ongoing physical fitness program for any of the deputized employees of the Sheriff's Department.

29. Crawford County did not in 1979 or prior thereto, and does not now, require incumbent deputy sheriffs to pass a regular fitness test or medical examination in order to retain their jobs.

30. Prior to the decision to compel Sergeant Strauman, Sergeant Brown and Patrolman Heiar to retire, Defendants did not review Plaintiffs' personnel files or request a medical opinion to determine if they were fit for their jobs.

• • • •

32. Prior to the retirement of Heiar and Strauman, no employee of the Crawford County Sheriff's Department had ever been involuntarily retired because of age.

• • • •

35. None of the Plaintiffs are receiving full retirement benefits (defined as 50% of final rate of earnings) under the Wisconsin Retirement Fund.

• • • •

37. In December, 1979, all three plaintiffs filed charges with the State Agency, the Department of Labor,

Industry & Human Relations, Equal Rights Division. The charge alleged that they had been compelled to retire at age 55.

38. The Equal Rights Division responded as follows:

"We are unable to investigate your claim of discrimination against the Crawford County Sheriff's Department because Wisconsin's Fair Employment Law does not coverage discrimination against any hazardous type occupation such as law enforcement or fire fighting." (Exh. 35)

* * * *

44. Subsequent to the filing of Plaintiffs' charges conciliation was undertaken by EEOC.

45. The results of EEOC's attempted conciliation were unsuccessful. On March 18, 1982, all Plaintiffs were notified by letter . . . .

46. Plaintiffs commenced this action by Complaint filed April 16, 1982.

* * * *

51. Individuals with less than 20 years of service under WRF who are forced to retire early cannot qualify for any military service credit under Wis. Stat. §41.09 (3)(c).

* * * *

(R. 46, pp. 1-9)

———o———

TESTIMONY OF KENNETH STRAUMAN
DIRECT EXAMINATION BY MR. HESSLINK:

Q. Could you spell your name and give your address for the record please?

A. First name Kenneth, I. Strauman, S-t-r-a-u-m-a-n, 1021 South Sixth Street, Prairie du Chien, Wisconsin, Crawford County.

* * * *

Q. Did you ever have occasion to draw a weapon of any type during the course of your duties at the sheriff's department?

A. The only weapon that I have ever drawn was at a roadblock for escapees, jail break, and that was a sawed-off shotgun.

Q. Did you ever have an occasion to discharge a weapon in the line of duty other than training at the Crawford County sheriff's department?

A. No.

Q. What is the most stressful situation that you recall in your tenure at the Crawford County sheriff's department?

A. High-speed chases.

Q. What was stressful about high-speed chases?

A. At the time you had to watch for traffic and animals on the highway.

Q. Did the nature of high-speed chases change over time as you were employed at the sheriff's department?

A. Yes. The squad cars go slower.

Q. Were there any changes in policy regarding high-speed chases?

A. Yes.

Q. What was that change in policy?

A. Ten miles over the speed limit. (R. 85, pp. 3-14)

———o———

TESTIMONY OF WILLIAM BANTA
DIRECT EXAMINATION BY MR. UELMEN:

Q. Would you state your name for the record, please.

A. William Banta.

Q. By whom are you employed?

A. I'm retired.

Q. By whom were you employed before you retired your recent position?

A. With the U.S. Marshal's Service here in Madison, Wisconsin.

* * * *

Q. How long were you employed by the U.S. Marshal's Service?

A. Twenty-three-plus years.

Q. And what positions did you hold with that service during your employment?

A. As a deputy, a chief deputy, U.S. Marshal; and I retired as a Chief Deputy.

* * * *

CROSS-EXAMINATION BY MR. HESSLINK:

* * * *

Q. Do U.S. Marshals engage in routine traffic patrol?

A. No.

* * * *

Q. How about running a police radio? In your view would that be more or less stressful than being responsible for the security of a federal prisoner?

A. I think that would be less stressful, because you are not out on the street facing all these unknowns.

Q. You aren't meaning to say, are you, that the duties of a deputy sheriff in Crawford County are identical in

terms of what they do on a daily basis to what you, a U.S. Marshal, does?

A. No, because we're not involved with the highway patrol and the house calls on family feuds, so to speak. But I am saying basically as a rule, you know, that we are officers of the court, like the sheriff I'm sure is an officer of his court. We take care of all the court's demands hopefully. (R. 86, pp. 311-321)

———o———

TESTIMONY OF EUGENE E. BABLER
DIRECT EXAMINATION BY MR. UELMEN:

Q. Would you state your name for the record, please.

A. I guess my official name would be Eugene E. Babler, B-a-b-l-e-r.

* * * *

Q. By whom were you employed prior to your employment with the District Attorney?

A. With the FBI as a Special Agent.

Q. How long did you work for the Federal Bureau of Investigation?

A. Approximately twenty-nine and a half years.

* * * *

CROSS-EXAMINATION BY MR. HESSLINK:

* * * *

Q. You don't mean to testify an FBI agent does on a daily basis what a local law enforcement official does?

A. No. Minute by minute, no but they are comparable.

Q. There are also substantial differences, are there not?

A. I would say there are some differences.

Q. For example, as an FBI agent you normally don't engage in local traffic patrol?

A. That is correct.

Q. You don't function as dispatcher on a radio?

A. No. That would be a clerical function. (R. 86, pp. 359-386)

———o———

TESTIMONY OF WILLIAM C. FILLBACH
DIRECT EXAMINATION BY MR. UELMEN:

Q. Would you state your full name for the record, please.

A. William C. Fillbach, F-i-l-l-b-a-c-h.

Q. By whom are you employed?

A. Crawford County Sheriff's Department.

Q. And what position do you hold with the Sheriff's Department?

A. Sheriff of Crawford County.

Q. How long have you been the Sheriff of Crawford County?

A. This is my fifth term. That would be nine years.

Q. Did you work for the Sheriff's Department prior to the time that you became sheriff?

A. Yes, sir, I did.

Q. What year did you start working with the Sheriff's Department?

A. Approximately 1968.

Q. What position did you hold in 1968?

A. Traffic officer.

• • • •

Q. Does your department have any responsibility with respect to automobile accidents?

A. Yes, we do investigate all or most of the accidents. We have approximately between 400 and 500 accidents in Crawford County. The State Patrol probably takes care of about 20, 25 of those maybe.

• • • •

Q. Would you tell the Court what in your opinion is the most stressful part of the work of being a deputy sheriff in Crawford County?

A. Oh, I think there's many things that are stressful. I know the problem is that you put a lot of mileage on a car in an eight-hour shift if you go all over Crawford County, and you got to be on your toes all the time if you're stopping cars or driving. Like I said earlier, the terrain of the curves and the hills.

Another problem is that when you get the call to go to a house fight or a bar fight or an accident, you never know what's going to be there. You always want to expect the worse.

• • • •

CROSS-EXAMINATION BY MR. HESSLINK:

Q. Sheriff Fillbach, is it fair to say that the Crawford County Sheriff's Department has never had any kind of a physical fitness program?

A. Yes, sir, that is correct.

Q. Is it also fair to say that the Crawford County Sheriff's Department has never used any kind of physical tests as a condition of continued employment in the Sheriff's Department?

A. Yes, sir, that is correct.

Q. Would it also be fair to say that prior to the retirement or the retirement of the three plaintiffs, that Crawford County never considered physical fitness to be a major requirement of the job of deputy sheriff?

A. Yes, sir, that is correct.

Q. At what point in time did Crawford County consider physical fitness to be a major requirement of the job of deputy sheriff?

A. I don't know if they ever have.

Q. Who is an individual named Joe Schultz?

A. Joe Schultz was a radio operator-jailer when I came with the Sheriff's Department in 1968.

Q. How long did he remain as a radio operator-jailer at the Sheriff's department?

• • • •

A. '75.

Q. '75. Mr. Schultz had one leg?

A. Yes, sir, that is correct.

• • • •

Q. But he never had any difficulty in completing his duties or responsibilities that you were aware of?

A. No, sir.

Q. Do you recall, were you present during the testimony of Dr. Grossman when he indicated that one of the risk factors for cardiovascular disease was diabetes?

A. Yes, sir, I was.

Q. Do you presently have any officers on the police department in Crawford County who you know of to have diabetes?

A. Yes, sir. We have one.

Q. Were you present during the testimony of Dr. Foss when he indicated that one of the factors which would inhibit a police officer's ability to perform his duty is obesity?

A. What's that mean? I'm sorry, but I—

Q. Being too fat in weight.

A. Yes, sir.

Q. Are you familiar with Mr. Lund?

A. Yes, sir, very well.

Q. Can you tell me about how much Roger Lund weighs?

A. I never did find out. But over 300 pounds.

Q. Do you fell that Roger Lund is capable of performing the duties and responsibilities of chief deputy in the Sheriff's Department?

A. He has the last nine or ten years.

• • • •

Q. Now, I believe on your direct testimony that you said there was a robbery a few years ago in Crawford County.

A. Yes, there was.

Q. How long ago was that?

A. I'd have to say probably 1976-77.

Q. And I think you said about the time you started there was a murder in Crawford County. Was that when you started fifteen years ago as a deputy or nine years ago as a sheriff?

A. Nine years as a sheriff.

• • • •

Q. Have you ever had occasion to draw it [firearm] and point it at another human being?

A. Never pulled it to and pointed it at another human being, but I did have the strap off several occasions in case I had to use it in the situations that I was in. (R. 82, pp. 323-349)

1979

CRAWFORD COUNTY SHERIFF'S DEPARTMENT

Sheriff

William C. Fillbach

Chief Deputy

Roger C. Lund

Investigator and Traffic Officer

Robert Ostrander

Traffic Officers

Sgt. Kenneth Strauman
Frederick Brockway
Wesley Heiar
Terrence Zinkle

Radio Operators/Jailers

Sgt. Myrl Brown
Patrick May
Gary Sprosty
Mary Nash
Gary George

Secretary

Ruth Jackley

Janitor

George Ingle

/s/ William C. Fillbach
Sheriff

12/28/82
(Exhibit 16)